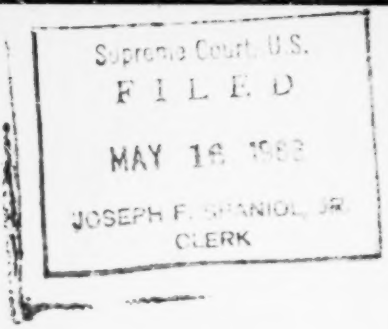
85 - 1899



NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

BLANCHE A. DAVID, Petitioner,

v.

DEFENSE LOGISTICS AGENCY, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE FEDERAL CIRCUIT

JOHN MURCKO, ESQ.
506 - 15th Street
Suite 500
Oakland, CA 94612
(415) 465-2241

Attorney for Petitioner

QUESTIONS PRESENTED

1. Whether the statutory right to an attorney under the Civil Service Reform Act (5 U.S.C. 7701(a)(2)) at a Merit Systems Protection Board hearing may be denied to a discharged federal employee on the basis that petitioner did not notify the hearing officer of her inability to locate an attorney prior to the MSPB hearing and that the petitioner was not diligent in locating the services of an attorney?

2. Whether the constitutional right to due process of law was violated by Defense Logistics Agency in terminating petitioner contrary to agency regulations and by the Merit Systems Protection Board in failing to grant a continuance to petitioner to allow a representative and in failing to follow regulations to gauge the validity of the punishment?

3. Whether the Court of Appeal was remiss in its statutory obligation under 5

U.S.C. 7703 in failing to review the record to determine whether the agency action was supported by substantial evidence?

PARTIES TO THIS PROCEEDING

The Petitioner is BLANCHE A. DAVID (hereafter DAVID).

The Respondent is DEFENSE LOGISTICS AGENCY (hereafter DLA).

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THIS PROCEEDING	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINION BELOW	1
JURISDICTION	2
STATUTES	2
STATEMENT	3
REASONS FOR GRANTING THE PETITION	13
CONCLUSION	45

TABLE OF AUTHORITIES

CASES	Page
American School of Magnetic Hearing v. McAnnulty 187 U.S. 94	16
Antonik v. United States 445 F.2d 592 (6th Cir. 1971)	30
Arnett v. Kennedy 416 U.S. 134 (1974)	24
Bavier v. Department of Transportation 5 MSPB 73 (1981)	39,41
Billings v. Truesdale 321 U.S. 542 (1944)	17
Conn v. United States 376 F.2d 878 (Cl.Ct. 1967)	30
Consumer Product Safety Commission GTE Sylvania, Inc. 447 U.S. 702 (1980)	20
Denby v. Berry 263 U.S. 29 (1923)	17
F.C.C. v. Broadcasting Service Organization 337 U.S. 901 (1949)	15
Geiger v. Brown 419 F.2d 714 (D.C. Cir. 1969)	30
Grimm v. Brown 449 F.2d 654 (9th Cir. 1971)	30
Hall v. Fry 509 F.2d 1105	30

TABLE OF AUTHORITIES (continued)

CASES	Page
Hanifan v. United States 354 F.2d 358 (Ct.Cl. 1965)	30
Harmon v. Brucker 355 U.S. 579	17,28
In re Van Sciver 1 MSPB 94 (1979)	39
Kohn v. Laird 460 F.2d 1318 (7th Cir. 1972)	30
Leone v. United States 204 Ct.Cl. 334 (1974)	30
Lindahl v. OPM ___ U.S. ___, 105 S.Ct. 1620 (1985)	15,20, 38
Nash v. United States Postal Service 8 MSPB 8 (1981)	31
Parodi v. MSPB 690 F.2d 731 (9th Cir. 1982)	5
Patterson v. Lamb 329 U.S. 539 (1947)	17
Reaves v. Ainsworth 219 U.S. 296 (1911)	16
S.E.C. v. Otis and Company 338 U.S. 843 (1949)	15
Service v. Dulles 354 U.S. 363 (1957)	29,30, 37

TABLE OF AUTHORITIES (continued)

	Page
CASES	
United States ex rel. Accardi v. Shaughnessy 347 U.S. 260 (1954)	29
United States ex rel. French v. Week 259 U.S. 336 (1922)	16
United States ex rel. Sledgeski v. Commanding Officer 478 F.2d 1147 (2nd Cir. 1973)	30
United States v. American Trading Association 310 U.S. 534 (1940)	24
United States v. Larinoff 431 U.S. 864	18,28
United States v. Security Bank ___ U.S. ___, 103 S.Ct. 407 (1982)	23
Vitarelli v. Seaton 359 U.S. 535 (1959)	29,37
Walker v. Washington 627 F.2d 541 (1980)	38
STATUTES	
Civil Service Reform Act of 1978 P.L. 95-454	14,18
92 Stat. 1111	1,14, 18
5 U.S.C. 7701	3,14, 20

TABLE OF AUTHORITIES (continued)

	Page
STATUTES	
5 U.S.C. 7701(a)	18,21
5 U.S.C. 7701(a)(2)	22
5 U.S.C. 7703	3,15
5 U.S.C. 7703(c)	19,37
5 U.S.C. 7513(b)	26
28 U.S.C. 1254(1)	2
MISCELLANEOUS	
5 C.F.R. 630.40	3
5 C.F.R. 630.401	31,33
5 C.F.R. 630.403	42,43
5 C.F.R. 1201.31	33,34
Federal Personnel Manual, Chapter 751, sub. 1-20 (1976)	35
Supreme Court Rules, Rule 171(c)	15
United States Congressional and Administrative News, 95th Cong. 2d Sess. (1978) 2773	24,26

\NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

BLANCHE A. DAVID, Petitioner,

v.

DEFENSE LOGISTICS AGENCY, Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEAL
FOR THE FEDERAI CIRCUIT

John Murcko, Esq. on behalf of BLANCHE A. DAVID petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeal for the Federal Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeal for the Federal Circuit was reported in an unpublished decision on September 18, 1985.

(Appendix 1a-2a)[1]. The Court of Appeal issued a further order on February 27, 1986 denying a petition for rehearing and request for rehearing en banc. (App. 3a). The decision of the Merit Systems Protection Board is unreported. (App. 4a-22a). The decision of the Defense Logistics Agency notifying petitioner of her termination was dated May 3, 1984. (AF, Ex. B).[2]

JURISDICTION

The final order and judgment of the Court of Appeal was entered on February 27, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES

The authority relied upon in this petition include the Fifth Amendment; 5

---

1. Hereafter "Appendix" will be "App".
2. AF refers to the agency file of the Defense Logistics Agency which is part of the record of the MSBP. It has Exhibits A-W.

U.S.C. 7701; 5 U.S.C. 7703; 5 C.F.R. 1201. 31. 5 C.F.R. 630.40; and FPM Section 751.

STATEMENT

Petitioner DAVID had been a dedicated employee of the federal government for over 41 years commencing April 17, 1942; and ending on May 18, 1984.

Petitioner commenced working for the United States in 1942 as a clerk. (AF, Ex. A). On January 1, 1947 petitioner acquired permanent status in the competitive classified civil service. At the time she worked as a clerk stenographer. (AF, Ex. W). Petitioner worked for the following federal agencies over the last forty-one years: Department of the Navy (1942-1943); Department of Commerce (1943); Department of the Treasury (1943-1968); Defense Logistics Agency (Defense Contract Management Area Service - SF) (1968-1984).

Her last superior, Elaine Courtier,

reported that petitioner was a good employee and had an excellent leave record prior to May, 1983. (RT 34).[3]

In 1981 petitioner became a substitute stewardess for American Federation of Government Employees Local 2723. In March 1982 petitioner became a regular stewardess. In her position as stewardess, petitioner represented employees at grievance hearings with respondent DLA.

Between July 1977 to the present respondent occupied the office building at 1250 Bayhill Drive, San Bruno, California. On numerous occasions between 1977 and 1983 there were problems regarding the dangerous and unsafe quality of air at the workplace as a result of the air conditioning system and the lack of proper ventilation. (App. 23a-29a).

---

3. Reporter's Transcript hereafter RT. A copy of the transcript will be lodged with the Court.

Petitioner filed complaints regarding the unsafe and polluted air with the Federal Labor Relations Board and with the Department of Defense in 1982-1983. (App. 31a). She also filed complaints against respondent regarding employee discrimination. (App. 36a-39a).

On January 14, 1983 petitioner testified through her affidavit in a hearing at the United States Court of Appeal for the Ninth Circuit, San Francisco, California in the case of Parodi v. MSPB, 690 F.2d 731 (9th Cir. 1982). She testified on behalf of Irene Parodi and against respondent regarding the position offered to Ms. Parodi and the unsafe quality of air in the work spaces. (App. 36a-39a).

On numerous occasions between February 1, 1983 and May 13, 1983 petitioner was harassed by various officials of the respondent.

On May 16, 1983 petitioner was not

able to work due to a serious illness later diagnosed as pneumonia. Petitioner called her supervisor on May 16, 1983 and notified her of the illness and requested annual leave. Five days later on May 23, 1983 petitioner called Mrs. Roberts and requested the annual leave be changed to sick leave. The requests were granted and petitioner was placed on sick leave. (RT 16).

Petitioner called her supervisor from her home on sixteen occasions between May 17 to June 3, 1983 regarding her illness.

On June 3, 1983 petitioner was hospitalized with extensive, severe pneumonia. (App. 40a-41a). On that date, petitioner filled out a SF-71 and gave it to hospital officials to mail. (RT 15).

In July, 1983 a friend of petitioner called Captain Iverson, the head of respondent agency, and notified his secretary that petitioner was in Mount Zion Hospital

in San Francisco with double pneumonia. (RT 44-45).

On July 19, 1983 Mrs. Robert wrote to petitioner and requested that she fill out standard form 71, hereafter SF-71. (RT 21).

In July 1983 petitioner was again hospitalized. This time it was for eye surgery. The nurse from Dr. Knapp's office notified Elaine Courtier of the surgery. (RT 52-53). On August 8, 1983 petitioner mailed in a second SF-71 to respondent. (RT 15).

On September 8, 1983 petitioner mailed a third SF-71 requesting sick leave from May 16, 1983. (AF, Ex. T). It was received by Elaine Courtier and approved. (RT 25).

On September 9, 1983 Dr. David Mackler sent a letter to the respondent notifying it of petitioner's severe pneumonia, of the cataracts in both eyes, of the surgical operation in July 1983, and of the severe osteoporosis. He projected a return to

work date for petitioner of January 1984. (App. 40a-41a).

On October 27, 1983 Elaine Courtier wrote to petitioner requesting a doctor's statement. (AF, Ex. Q). On November 8, 1983 petitioner wrote to respondent requesting claim injury forms. (AF, Ex. P).

On November 16, 1983 Courtier again wrote and sent the requested forms. She requested a doctor's certificate of sick leave, and petitioner's anticipated return date to work. (AF, Ex. M).

On November 21, 1983 petitioner informed respondent that a physician's certificate and SF-71 had been mailed to them. She also requested that her leave record be changed from sick leave to leave without pay. (AF, Ex. M).

On November 25, 1983 respondent denied petitioner's request to be placed on leave without pay. (AF, Ex. K).

On November 29, 1983 petitioner's supervisor, Elaine Courtier, received a call from a friend of petitioner informing her that petitioner was to be operated on for eye surgery on November 30, 1983. Courtier also received a call on November 29, 1983 from Dr. Knapp's nurse, Mrs. Briscoe, who informed her that petitioner was going to the hospital for eye surgery on November 30, 1983. (RT 33-34).

On the same day, Captain R.I. Iverson called Dr. Knapp's office and spoke to Mrs. Briscoe. He learned that petitioner was a patient and was scheduled for eye surgery on November 30, 1983. There had been a previous eye operation on petitioner in July 1983, and the present operation was on the second eye. She had recovered from the first and was not ready for the second operation. (RT 57-59).

Nurse Briscoe had notified Captain Iverson that the date for petitioner's

return to work would be at least four months after the operation or April 1, 1984. (App. 22a).

On December 1, 1983 petitioner was placed on absence without leave status (AWOL). (RT 34).

On March 7, 1984 Courtier wrote to petitioner notifying her that petitioner will be removed from federal service after 30 days for absence without leave since December 1, 1983 and for failure to request leave in accordance with established procedures. (AF, Ex. D).

Petitioner was still recuperating from her eye surgery at the time. (App. 43a).

On May 18, 1984 petitioner was terminated from employment with the federal government after 41 years of outstanding service. (AF, Ex. A, B).

Petitioner appealed her decision to the Board on June 6, 1984. The original

hearing had been scheduled for August 16, 1984. It was continued pursuant to request of respondent until August 23, 1984. On August 22, 1984 petitioner requested a continuance of the hearing to obtain counsel. She had not been able to obtain the services of an attorney with requisite skill and experience before the Board until the day before the hearing. (App. 45a-47a).

At the MSPB hearing on August 23, 1984 respondent was represented by an attorney, Ms. Jennifer Smith. However, petitioner did not have an attorney to represent her at the hearing. At the very commencement of the hearing she requested a continuance to obtain counsel. She objected to the hearing without having a representative present. Petitioner stated that she could not properly represent herself because she was not experienced in hearings before the MSPB, because she was ill and weak, and because she was not sufficiently familiar

with the art of cross-examination, or the type of evidence that needed to be produced. Petitioner repeatedly requested that the hearing not proceed because she was without an attorney. She did not produce any evidence on her own behalf. (RT 4-9, 14, 37, 38, 44, 51, 56, 66).

The hearing officer denied petitioner the right to an attorney, and denied her a continuance to obtain an attorney on the basis that she was not diligent in securing counsel. (App. 10a-11a).

The MSPB denied the petitioner's appeal for reinstatement. It held that the agency proved by a preponderance of evidence that the petitioner was absent without leave from December 1, 1983 to March 7, 1984 and that she failed to follow the regulations in requesting leave; that the absence impaired the efficiency of the service, and that the penalty of termination was reasonable for the conduct

involved. (App. 4a-22a).

Petitioner filed an Appeal to the United States Court of Appeal for the Federal Circuit on October 20, 1984. The decision was rendered on September 18, 1985 affirming the decision of the MSPB sustaining petitioner's removal for being absent without leave and for failure to request leave in accordance with established procedures. The Court of Appeal affirmed on the basis of the opinion of the MSPB. It did not write a separate opinion.

On October 15, 1985 petitioner filed a petition for rehearing and for a hearing en banc. The petition for rehearing and for rehearing en banc were denied on February 27, 1986. (App. 3a).

REASONS FOR GRANTING THE PETITION

The Court of Appeal by affirming the opinion of the MSPB has held that a

petitioner's statutory right to an attorney at a MSPB hearing under 5 U.S.C. 7701 can be denied by a hearing officer on any basis. This unwarranted action presents a misconstruction of the rights guaranteed to a federal employee by the Civil Service Reform Act of 1978; P.L. 95-454, 92 Stat. 1111.

The holding below is inconsistent with this Court's decisions that agency action must be carried out in deference to the statutory framework. The holding below is further inconsistent with this Court's decisions recognizing that agency action taken in violation of its own regulation amounts to a denial of due process and is therefore unlawful. There were three regulations that were violated by the MSPB and the DLA. The first was by the agency in changing petitioner's status from sick leave to absence without leave. The second and third were by the

MSPB in refusing to give petitioner a continuance to obtain counsel and in failing to consider the twelve criteria for measuring the propriety of the penalty.

The Court of Appeal also failed to properly review the record to determine if the evidence was substantial as required under 5 U.S.C. 7703. The Court of Appeal has incorrectly decided an issue of significant importance to the members of the executive agency. This decision is in contradiction to express agency regulations and statutes. Review by this Court is required.

1. This Court should grant certiorari to the Court of Appeal because the decision clearly conflicts with prior Supreme Court decisions. F.C.C. v. Broadcasting Service Organization, 337 U.S. 901 (1949); S.E.C. v. Otis and Company, 338 U.S. 843 (1949); Supreme Court Rules, Rule 171(c).

The federal courts have power to grant relief to the action of a federal executive official where the department has exceeded its statutory authority. American School of Magnetic Hearing v. McAnnulty, 187 U.S. 94. The interpretation by executive officials of Acts of Congress do not bind the federal courts from reviewing that interpretation or action taken pursuant to that interpretation.

This Court initially reviewed agency administrative action taken pursuant to an act of Congress only to determine whether the agency "was acting within the scope of its lawful powers." Reaves v. Ainsworth, 219 U.S. 296, 304 (1911). Federal courts originally did not review the factual basis for the agency action. United States ex rel. French v. Week, 259 U.S. 336 (1922).

From the earliest this Court ruled that action of the agency in discharging

personnel in contravention of a statute could be reviewed because "the case involves the construction of the general statutes of the United States." Denby v. Berry, 263 U.S. 29, 31 (1923); Patterson v. Lamb, 329 U.S. 539, 542 (1947); Billings v. Truesdale, 321 U.S. 542 (1944).

In Harmon v. Brucker, 355 U.S. 579, this Court held that federal courts may review agency action to determine if an official has acted outside the scope of his powers. This Court stated:

> "Generally, judicial relief is available to one who has been injured by an Act of a governmental official which is in excess of his express or implied powers...The District Court had only had jurisdiction...but also power to construe the statutes involved to determine whether the respondent did exceed his powers. If he did so, his actions would not constitute exercises of his administrative discretion, and, in such circumstances as those before us, judicial relief from this action would be available." Harmon v. Brucker, 355 U.S. at 581-582.

This Court in the variable reinlistment bonus cases, United States v. Larinoff, 431 U.S. 864, held that Naval action changing a reinlistment bonus was in conflict with a Congressional statute and invalid.

The Court of Appeal below incorrectly upheld the decision of the MSPB by affirming its decision allowing petitioner's termination from federal employment. The MSPB decision itself was based on a procedural violation of the Civil Service Reform Act, P.L. 95-454, 92 Stat. 1111.

Under 5 U.S.C. 7701(a), an employee has certain rights at an appeal hearing before the MSPB. This includes the right:

> "(1) to a hearing for which a transcript will be kept;
>
> (2) to be represented by an attorney or other representative."

In addition, the Court of Appeal must review the MSPB decision to determine whether the MSPB decision was arbitrary,

capricious, or an abuse of discretion; was obtained without following applicable procedures, or was unsupported by substantial evidence in the record. 5 U.S.C. 7703(c); Lindahl v. OPM, ___ U.S. ___, 105 S.Ct. 1620, 1624 (1985).

a. Plain language of the statutes.

The Civil Service Reform Act of 1978 (CSRA) comprehensively overhauled the civil service system. Congress created a new framework for judging adverse actions taken against federal employees. It also established exacting standards for review of agency decisions. "In the MSPB review procedure, the appellant is entitled to an evidentiary hearing, to a transcript, and to the presence of an attorney or other representative." Lindahl v. OPM, ___ U.S. ___, 105 S.Ct. 1620, 1624, n. 5.

In determining the meaning of any new statute, this Court traditionally begins "with the familiar canon of statutory construction that the starting point for

interpreting a statute is the language of the statute itself." Consumer Product Safety Commission v. GTE Sylvania, Inc., 447 U.S. 702 (1980).

Looking at the statute, itself, Congress specifically stated that an employee who has been the subject of an adverse action has the right to be represented by an attorney at the MSPB hearing. This Court has recognized that right in Lindahl. Under the plain language of 5 U.S.C. 7701, petitioner DAVID had the right to be represented by an attorney.

The MSPB official denied the right to representation to DAVID. The official claimed two reasons for the denial: first, it held that petitioner did not notify the official in advance that she did not have an attorney. Second, it held that she was not diligent in securing counsel. (App. 7a, 10a-11a).

The effect of this construction of 5 U.S.C. 7701(a) resulted in a denial of representation to DAVID at the hearing in violation of the plain language of the statute. The statute does not require that an employee appearing before the MSPB must notify the hearing official before the hearing that she did not have an attorney. Nor does the statute require that the employee show due diligence in obtaining an attorney, or be denied the right to representation.

This interpretation of the statute does violence to the intent of Congress in passing the CSRA. Its intent was to provide a new framework to guarantee the rights of federal employees at MSPB hearings. A crucial part of this procedure was to guarantee the employee the right to be represented at a hearing.

The MSPB action in denying petitioner her right to an attorney at the hearing

was action taken in violation of 7701(a)(2). The MSPB hearing officer acted in excess of his power. The action was in conflict with a Congressional statute and invalid.

Even more importantly, the factual basis upon which the hearing official relies was incorrect. The petitioner did notify the hearing officer the day prior to the hearing on August 22, 1984 that she was not able to proceed at the hearing because the attorney she was able to locate the day before the hearing did not have the opportunity to prepare for her case and to properly present her case until October, 1984. (App. 10a, 45a). Second, the MSPB claimed that she did not use due diligence to obtain an attorney. She obtained an attorney within six weeks of the time that she filed her notice of

appeal.[4] It is difficult to locate attorneys who handle federal employee cases.

The action of the MSPB was in violation of the procedures of law since petitioner was entitled to an attorney and the MSPB denied that right to her. The Court of Appeal action in affirming the MSPB decision was therefore also in violation of the CSRA.

b. Legislative history of the statute.

In determining the meaning of a statute and the legislative intent, the court has a duty to examine the legislative intent. United States v. Security Bank, ___ U.S. ___, 103 S.Ct. 407, 414, n. 12

4. Petitioner filed her notice on appeal on June 6, 1984. The hearing was originally scheduled on August 16, 1984. It was continued for one week, until August 23, upon request of the agency DLA. The MSPB incorrectly states the hearing was held on July 19, 1984.

(1982). This Court must ascertain the clearly expressed legislative intent of a statute. United States v. American Trading Association, 310 U.S. 534, 543-4 (1940).

The Congress in passing the CSRA recognized that the "central congressional purpose" was to "protect the right of employees, recognized by the Supreme Court in Arnett v. Kennedy, 416 U.S. 134 (1974) to a full and fair consideration of their case." United States Congressional and Administrative News, 95th Congress, Second Session (1978), 2773.

On hearings before the MSPB, the history explicitly states that

> "Section 7701 provides for the processing of adverse actions and other appeals within the jurisdiction of the Merit Systems Protection Board. The Board may refer any case appealable to it for adjudication to an appeals officer or to an administrative law judge who would have the authority to decide the case.

> Sections 7701(b) and (c) govern the type of hearing an employee must receive before the Board. The Committee amended this provision of the bill to make it absolutely clear that an employee would receive a full evidentiary hearing in any case where there is a dispute as to any genuine and material issue of fact - that is, a dispute as to facts which must be resolved before a decision can be reached, and which may be most appropriately considered and resolved through the traditional adjudicatory methods used in evidentiary hearings. This would include instances, for example, where oral testimony and cross-examination is the best way to test the credibility of the witnesses. The bill was amended by the Committee to specifically provide that in such cases an evidentiary hearing should include the traditional right of cross-examination. In any case involving removal of an employee from the Federal service, the Board, because of the importance of the case, must provide that the case be heard by an administrative law judge selected according to the especially demanding procedures specified in the Administrative Procedure Act, or the Board must assign the case to one of its more qualified and experienced appeals officers."

Id. at 2775, 2776.

In addition, the right to an attorney at the appellate stage of an adverse action was statutorily extended to the predecision stage of the agency action. Id. at 2772-2773, 5 U.S.C. 7513(b).

Thus, the legislative history is clear that Congress intended to provide a full and fair hearing wherein the adversely affected employee will be given a full and fair consideration of her (his) case.

In this case, the hearing officer prevented DAVID from receiving a full and fair consideration of the case. First, without the assistance of counsel, DAVID was not able to muster the necessary evidence to show the true status of her medical condition, the facts which would prove that the medical reports were sent by the medical doctors to the agency DLA, and that the actions taken by DAVID were in compliance with the regulations.[5]

5. See Appellant's Opening Brief in

Also, DAVID did not have the knowledge or expertise to properly cross-examine the witnesses for the agency who attempted to show that DAVID was remiss in not properly notifying the agency of her illness and other inability to work. Proper cross-examination of these witness would have shown that they were fabricating this testimony since the documents had been mailed by DAVID and her doctor to agency officials on three occasions. Also, proper cross-examination would have revealed that the true reason for the termination was DAVID's actions as a union stewardess in vigorously advocating employee rights at grievance meetings before the direction of DLA.[6]

Court of Appeal, p. 21

6. (See App. 16a). Also, other union officials could have been called, including the President of AFGE, Local 2723 who could have testified that the actions of DLA were in retaliation for petitioner's union activity.

Thus, contrary to Congressional intent, a full and fair hearing was never held. Contrary to Congressional intent, the adjucatory method required in evidentiary hearings, including the right to an attorney, was never held. Contrary to Congressional intent, the traditional right of cross-examination was not allowed. The hearing by the MSPB official was a sham. It was clearly not in accordance with procedures intended by Congress to govern the hearings. The Court of Appeal below was remiss in its duties in failing to recognize that the MSPB denied these essential procedures to petitioner. More importantly, the actions of the official were in excess of his powers and contradictory to the decisions of this Court in United States v. Larinoff, 431 U.S. 864 and Harmon v. Brucker, 355 U.S. 579. This Court should grant this petition and reverse the decision of the

Court of Appeal.

2. The decision of the Court of Appeal also conflicts with decisions of this Court on violations of an agency of its own regulations.

Administrative action of the executive department in violation of their own regulations establishing procedures for review are invalid. United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260 (1954); Service v. Dulles, 354 U.S. 363, 388 (1957). The head of an executive department must comply with its own procedural regulations in dismissing an employee. Vitarelli v. Seaton, 359 U.S. 535 (1959).

"Where the military has laid down its own rules and regulations, such rules and regulations cannot be ignored, and courts may examine the order to ascertain whether the military's rules and regulations were

violated in a manner resulting in substantial prejudice." Hall v. Fry, 509 F.2d 1105, 1110; United States ex rel. Sledgeski v. Commanding Officer, 478 F.2d 1147 (2nd Cir. 1973); Kohn v. Laird, 460 F.2d 1318 (7th Cir. 1972). Action by military service taken in violation of its regulations is invalid and void. Geiger v. Brown, 419 F.2d 714 (D.C. Cir. 1969); Grimm v. Brown, 449 F.2d 654 (9th Cir. 1971); Antonik v. United States, 445 F.2d 592 (6th Cir. 1971); Conn v. United States, 376 F.2d 878 (Cl.Ct. 1967).

Where an agency has taken adverse personnel action in substantial violation of procedural regulation, it is a void action and the employee is entitled to recover any pay of which he has been illegaly deprived. Service v. Dulles, 354 U.S. 363; Leone v. United States, 204 Ct.Cl. 334 (1974); Hanifan v. United States, 354 F.2d 358 (Ct.Cl. 1965).

a. In the present case, the respondent's action is guided by federal regulation promulgated by the Office of Personnel Management. 5 C.F.R. 630.401 provides that "An agency shall grant sick leave to an employee when the employee...(b) Is incapacitated for the performance of duties by sickness, injury, or pregnancy and confinement."

In Nash v. United States Postal Service, 8 MSPB 8 (1981) the Board held that an employee who was placed on AWOL status and terminated even though he submitted medical evidence untimely in accordance with the agency's sick leave procedures was improper. The Board ruled that the agency action in declaring an employee AWOL when they have valid medical information that he is ill or incapacitated is a violation of the agency regulations and invalid.

The identical situation exists in the

present case. Petitioner was placed on sick leave status on May 16, 1983.

On December 1, 1983 the respondent had information that petitioner was incapacitated for the performance of her duties due to eye surgery. This had been substantiated by a call first from a friend of the petitioner, then by Mrs. Briscoe, the nurse for Dr. Knapp. It was further substantiated when Captain R.I. Iverson personally telephoned Dr. Knapp's office on November 29, 1983 and was told that petitioner was scheduled for eye surgery on November 30, 1983 by Dr. Knapp. (RT 35-37). Dr. Knapp's nurse had informed Captain Iverson that petitioner's return to work date would be April 1, 1984. (App. 43a).

The action by respondent on December 1, 1983 was in violation of its own regulations since they had information that petitioner was incapacitated due to eye

surgery and the agency was required to grant sick leave under 5 C.F.R. 630.401.

The action in violation of the regulation was harmful to petitioner since it resulted in her being unlawfully placed in an AWOL status on that day. The change of status eventually resulted in her termination.

Had the agency followed its own regulations regarding sick leave, this dismissal would not have occurred. Thus, the MSPB action is valid, and the Court of Appeal decision affirming the MSPB action is also invalid.

b. In regulations promulgated by the MSPB, "All parties to an appeal may be represented in any manner relating to an appeal." 5 C.F.R. 1201.31. Also, under 5 C.F.R. 1201.31 where a counsel is dis-

qualified petitioner must be granted a continuance.

The MSPB violated its own regulations by denying DAVID the right to be represented in any manner relating to the appeal under 5 C.F.R. 1201.31. The MSPB hearing officer also violated its own regulation in failing to grant a continuance to her to have an attorney present. (App. 10a, 45a). The MSPB in effect disqualified DAVID's selected representative by refusing to give a continuance on either August 22 or 23, 1984. DAVID had sought to retain counsel on August 22nd. However, the hearing officer refused to grant a continuance to counsel to prepare for the case. It would not have been possible for counsel to prepare for the hearing, to prepare for cross-examination of government witnesses, to subpoena the doctors, nurses, union officials, and other employee witnesses in less than 24

hours. The action of the hearing officer was harmful error because it prevented DAVID from having a full and adequate hearing on the issue of the validity of her termination.

c. Last, the MSPB violated the regulations contained in the Federal Personnel Manual, Ch. 751, sub. 1-20 (1976). FPM 751 specifically provides for twelve criteria that are relevant in assessing the reasonableness of a penalty of dismissal by an agency. Neither the agency nor the MSPB considered all twelve criteria in imposing the penalty. The MSPB only considered five of those criteria including the seriousness of the offense, the supervisor's confidence in petitioner's ability to perform work, the clarity of petitioner's knowledge of the rules violated, her past work and conduct record, and her potential for rehabilitation.

(App. 14a-16a). It failed to consider the status of her position, her lack of contact with the public, that her absence was not a serious burden, the lack of notoriety of the offense (being absent because of eye surgery or bronchitis did not have any adverse impact on the agency), that petitioner was greviously incapacited from May 16, 1983 to April 1, 1984 (she had two eye surgeries and needed four months of recovery for each surgery, and had severe bronchitis).

DAVID was a forty-two year employee with an unblemished record. She was ill in 1983-1984 and undergoing medical treatment for cataracts and bronchitis. The actions of termination were clearly in excess of the nature of any offense, for a minor AWOL, which was nonexistent.

More important, the DLA and MSPB violated the regulatory guidelines by refusing to consider these factors in assessing

the penalty.

The decision of the Court of Appeal below in affirming these regulatory violations of the DLA and the MSPB was in contradiction of the numerous decisions of this Court. In Service v. Dulles, 354 U.S. 363, 388, this Court held that action taken by an agency in violation of its procedural regulations is an invalid action. Also, Vitarelli v. Seaton, 359 U.S. 535 prohibits an agency from ignoring its regulations in dealing with employees.

The actions are also in violation of 5 U.S.C. 7703(c) which require the Court of Appeal to disallow agency action taken in violation of procedural requirements.

3. The Court of Appeal failed to properly review the record of the MSPB, pursuant to 5 U.S.C. 7703(c).

Under the Civil Service Reform Act, the Court of Appeal shall review the record

of the MSPB and hold unlawful and set aside agency action, findings or conclusions found to be unsupported by substantial evidence.

First, the decision of the MSPB must be supported by substantial evidence or the Court of Appeal shall set aside the findings. Lindahl v. OPM, ___ U.S. ___, 105 S.Ct. 1620, 1624, n. 5 (1985); Walker v. Washington, 627 F.2d 541, 549 (1980).

In this case, it appears that the Court of Appeal never fully reviewed the record. Its decision only adopts the decision of the MSPB. (App. 1a-2a). It never responded to the issues raised by petitioner concerning the lack of substantial evidence in that (1) the agency failed to prove that petitioner was AWOL; (2) that the adverse action against petitioner was precluded by the laws granting sick leave; and (3) that the agency failed to prove that petitioner failed to

follow agency procedures in obtaining sick leave.[7]

Had the Court of Appeal properly reviewed the record, it would have discovered that the findings of the MSPB were not supported by substantial evidence.

a. The agency failed to prove that petitioner was AWOL.

The burden is on the agency to support its decision. The burden extends to "every element of the proof of the agency's case," including the propriety of the decision to deny leave. In re Van Sciver, 1 MSPB 94 (1979).

In Bavier v. Department of Transportation, 5 MSPB 73, 74 (1981) the petitioner requested hardship transfers based on his medical illness. They were denied. He was first declared to be temporarily medi-

---

7. See Petitioner's Brief in Court of Appeal, pp. 11-16.

cally disqualified. Later he was found to be medically fit and returned to duty. He did not report to duty and was placed in an AWOL status, and later terminated. The court held that the agency failed to prove that appellant was in fact absent without leave, and the decision was declared void.

The facts in the present case are identical to those in the Bavier case. The petitioner was granted sick leave on or about May 16, 1983 due to chronic bronchitis, pneumonia and cataracts. This was changed to sick leave on May 23, 1983. (RT 20). Later by request of petitioner on September 8, 1983 her sick leave was approved and made retroactive to May 16, 1983. The respondents had received a valid SF-71 on or about September 8, 1983. (RT 25). A letter from Dr. Mackler was also sent to the respondent stating that petitioner would not be permitted to

return to work until January 1984. (App. 40a-41a).

Respondent also admitted that they had word from Dr. Knapp's office that petitioner was to be operated on for eye surgery on November 30, 1983. (RT 30-31). In the record is an exhibit from Dr. Knapp stating that petitioner's return to work date was April 1, 1984. (App. 43a).

Thus, the decision of the respondent to place petitioner in an AWOL status on December 1, 1983 was not supported by a preponderance of the evidence. The respondent never introduced any medical evidence that petitioner was medically fit to return to duty. "The determination regarding his medical disqualification was a factual decision of crucial importance to him and to which he is entitled." Bavier v. Department of Transportation, 5 MSPB 73, 74.

Thus, there was no evidence to warrant changing petitioner's status from sick

leave to AWOL on December 1, 1983 and use it as a basis for termination on May 18, 1984. As such, the respondent's decision to remove the petitioner was not supported by a preponderance of evidence. The Court of Appeal decision should be reviewed to ascertain the extent of this error.

b. The agency also failed to prove that petitioner failed to follow procedures in obtaining sick leave.

Under applicable regulations, an agency may grant sick leave only where there is evidence to support the condition. "Regardless of the duration of the absence, an agency may consider an employee's certification as to the reason for his absence as evidence administratively acceptable." 5 C.F.R. 630.403. When the absence is over three days, the agency may also require a medical certificate or

"other administratively acceptable evidence as to the reason for the absence." 5 C.F.R. 630.403.

The second reason given by the agency for the termination was that petitioner failed to request leave in accordance with established procedures. (AF, Ex. C). The respondent testified that it repeatedly requested an SF-71 from petitioner and that she provide a medical certificate concerning the nature of her illness and expected return to duty date. (RT 34).

Respondent admitted that they received a completed SF-71 form from petitioner in September 1983. (RT 25). At the same time, on September 9, 1983, petitioner's doctor had mailed to respondent a letter explaining the medical condition of bronchitis, pneumonia and cataracts. (App. 40a).

Respondent also admitted that it received direct evidence on November 29,

1983 that petitioner was in the hospital for eye surgery. There was direct contact between Dr. Knapp's office and the highest supervisory officials, Iveron, Parker and Courtier, attesting to petitioner's eye surgery and an expectant four month recovery period. (RT 30-31).

Also, petitioner introduced evidence that she completed and had mailed three SF-71 forms for sick leave on June 3, 1983, on August 8, 1983 and on September 8, 1983. (RT 15, 44, 45).

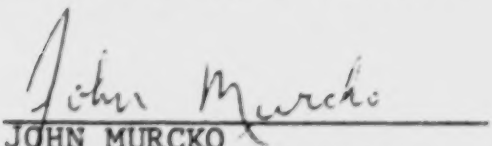
Thus, there was full or substantial compliance with the regulations requesting sick leave. The agency failed in its burden to show there was a violation. The Court of Appeal was remiss here again in failing to properly review the record. The decision should be set aside.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Dated: May 9, 1986

Respectfully submitted,



JOHN MURCKO
Attorney for Petitioner
BLANCHE A. DAVID